Filed 2/1/10 P. v. Cramer CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER LEE CRAMER, Defendant and Appellant.	G041362 (Super. Ct. No. 06NF3168) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Hoffer, Judge. Affirmed.

Sylvia Whatley Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Pamela Ratner Sobeck and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Christopher Lee Cramer was convicted of attempted premeditated murder and two counts of assault with a deadly weapon. He claims there is insufficient evidence he acted with premeditation, and the trial court committed a variety of evidentiary errors that violated his right to a fair trial. We reject his claims and affirm the judgment.

FACTS

On the night of September 1, 2006, Stelios Proios and his friend Daniel Castillo went to a bar in Anaheim called the Juke Joint. There they met some friends, had a few drinks, and were generally enjoying themselves, until they crossed paths with Cramer and codefendant Isaias Fernandez. When Proios approached them at the bar, Cramer called him a "wetback" and asked him who he "claimed," i.e., what gang he was in. Proios asked him what he was talking about, and Cramer replied that he and Fernandez — both of whom were sporting shaved heads — were members of the "PEN1 Skins."[1]

Proios had never heard of that particular gang, but he suspected it was a racist outfit, so he told Cramer something along the lines of, "'Oh, that sucks,'" or "'Fuck that. I'm Greek.'" Fernandez then came up from behind Cramer and "sucker-punched" Proios in the side of the head. That prompted bartender Henry Hill to intervene, and he ushered everyone out the back of the bar, into the rear patio area.

Defendants exited the bar first. Upon doing so, they took several steps away from the backdoor before Proios and Castillo came outside. During this interlude, Cramer pulled out a pocket knife, unfolded it, and tucked it down by his side. Then, when Proios finally made it outside, Cramer approached him near the doorway, and they exchanged heated words.

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[1] Apparently, this was a reference to Public Enemy Number One, "a white supremacist criminal street gang with a reputation for extreme violence." (*Studebaker v. Uribe* (C.D.Cal. Aug. 20, 2009) __ F.Supp.2d __, __ [2009 WL 2601241].)

Unaware of the knife, Proios directed an angry gesture toward Cramer. Cramer responded by warning Proios, "You don't know who you're fucking with, we'll take you down." Fernandez was only a few feet away at the time. At one point, Cramer shouted to him, "You tie him up [meaning Proios] and I'll stick him."

As the jousting continued, Proios threw a punch at Cramer.[2] Cramer then yelled out, "Let's get him," and he and Fernandez attacked Proios with a vengeance. Cramer repeatedly stabbed Proios in the head, neck and back, while Fernandez battered him with his hands and feet. Fernandez also took off his belt and whipped Proios several times. Cramer continued his knife attack until a woman pulled him away from Proios. For a time, she was able to steer Cramer several feet away from the wounded Proios. However, just as Proios was being helped back inside the bar, Cramer ran up and took one final, lunging stab at him with his knife.

Proios and Castillo eventually managed to make it back inside the bar. However, that was not the end of the matter. Defendants lingered in the parking lot, and when Proios and Castillo came outside later and tried to leave, defendants attacked them again. Cramer was still holding the knife, but he did not attempt to use it on this occasion. The fighting continued until bartender Hill was able to restore order, and at that point, defendants left the scene in Cramer's truck and drove to Fernandez's house. Along the way, they tossed the knife out the window and made derogatory remarks about Proios and Castillo, calling them "beaners" and "wetbacks." Cramer also lamented a wound on his hand, saying, "'I was trying to stab the guy, and I fucking cut my own hand.'"

Proios was taken to the hospital, where he received about 150 stitches for his lacerations. He suffered 14 different knife wounds in the attack, as well as a fractured cheek and a cranial blood clot.

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[2] Although Proios threw the first punch outside the bar, Cramer does not raise any issues pertaining to self-defense on appeal.

The defense tried to portray Proios as the instigator in the matter. To that end, the defense presented the testimony of two men, Moses Porras and Jose Martinez, who were playing pool in the Juke Joint before the initial confrontation occurred. They testified Proios approached them in the pool table area and asked if they would back him up in a fight against someone he was having trouble with. They agreed initially, following Proios to the bar. But when they saw Fernandez, they changed their minds and decamped.

I

In convicting Cramer of attempting to murder Proios, the jury found he acted with premeditation. Cramer argues there is insufficient evidence to support this finding, but the facts are otherwise.

Cramer's claim requires us to review the record in the light most favorable to the judgment to ascertain whether it discloses substantial evidence, i.e., evidence which is reasonable, credible, and of solid value, such that the jury could find him guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701, 758.) "'Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence . . . , it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. . . .'" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) We must uphold the judgment unless """upon no hypothesis whatever is there sufficient substantial evidence to support""" it. (*People v. Garcia* (2007) 153 Cal.App.4th 1499, 1508.)

The three categories of evidence traditionally deemed relevant to the issue of premeditation are: (1) planning activity, (2) facts concerning the defendant's

prior conduct with the victim, i.e., motive evidence, and (3) the circumstances surrounding the method of the killing. (*People v. Thomas, supra*, 2 Cal.4th at pp. 516-517, citing *People v. Anderson* (1968) 70 Cal.2d 15.) These categories are descriptive, not normative or exhaustive, and are intended "to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse. [Citation.]" (*People v. Perez* (1992) 2 Cal.4th 1117, 1125; see also *People v. Sanchez* (1995) 12 Cal.4th 1, 32-33; *People v. Edwards* (1991) 54 Cal.3d 787, 813-814.) We must remember "premeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Perez, supra,* 2 Cal.4th at p. 1127.)

Here, the record shows that after his initial confrontation with Proios inside the bar, Cramer was ushered outside the bar, where he immediately retrieved the knife from his pocket and opened it up. He was holding the weapon down at his side for several seconds before he confronted Proios and they began to argue. During this period, Cramer had plenty of time to contemplate his actions. And judging by what he said and did, he clearly had killing on his mind. He warned Proios, "You don't know who you're fucking with, we'll take you down." He also urged Fernandez to tie up Proios,[3] so he could "stick him." Fernandez wasn't able to restrain Proios, but that didn't stop Cramer from stabbing him multiple times in the head, neck and back. In fact, he desisted only when a woman intervened and pulled him away from Proios. During this break in the action, Proios had additional time to think about what he was doing. But instead of putting away the knife and calling it quits, he ran up and

[3] Which we take to mean — and the jury was free to interpret as — "occupy him," or to use the fighting terminology, "get him into a clinch."

took one final, lunging stab at Proios as he was being helped back into the bar. These facts show both planning and a calculated methodology on Proios' behalf.

Motive evidence was also present in the form of Cramer's stated allegiance to the "PEN1 Skins" and his multiple references to Proios as a "wetback" and "beaner." As our Supreme Court has explained, "Expressions of racial animus by a defendant towards the victim and the victim's race, like any other expression of enmity by an accused murderer toward the victim," are relevant to the questions of motive and premeditation. (*People v. Quartermain* (1997) 16 Cal.4th 600, 628.) Therefore, the jury could properly deduce that Cramer's use of racial slurs toward Cramer was indicative of a premeditative mindset. (*Ibid*.; see, e.g., *Davis v. State* (Ark. 2006) 232 S.W.3d 476, 481-482 [defendant's statement following shooting that "I killed that nigger" supported finding of premeditation]; *State v. Eggers* (Mo.App. 1984) 675 S.W.2d 923, 928 [defendant's statement to police that he had just "shot a nigger" supported finding of premeditation].)

For all these reasons, we reject Cramer's challenge to the sufficiency of the evidence. Viewed collectively, and in the light most favorable to the judgment, the record contains substantial evidence he acted with premeditation in attempting to take Proios' life.

II

During trial, the court allowed the prosecution to introduce videotape from the Juke Joint's surveillance cameras that showed both the initial confrontation inside the bar and the subsequent knife attack that occurred on the back patio. Cramer contends this was error because the police did not preserve *all* of the videotape that was captured by the Juke Joint's surveillance cameras that evening. We disagree.

The evidence on this issue came from lead investigator Catalin Panov and Juke Joint owner John Marovic. Their testimony established that although the Juke Joint has about nine surveillance cameras, some weren't working on the night in

question, and only three of them captured the fighting that took place that evening. As it turned out, Marovic wasn't able to make copies of the video from any of the cameras. So, he gave Panov the hard drive of his surveillance system and told him which three cameras had captured the fighting. Panov had a forensic technician copy the videotape from those three cameras only. He then returned the hard drive to Marovic, who subsequently recorded over all the surveillance tapes.

At trial, defendants moved to preclude any use of the videotapes. They did not dispute the fact the prosecution preserved all of the surveillance tapes pertaining to the actual fighting, but they faulted it for failing to preserve the other surveillance tapes that were on Marovic's hard drive. In particular, they complained about the unavailability of the videotape of the pool table area, which is where Proios allegedly solicited help from Porras and Martinez before any of the fighting took place.

The defense argued that if the jury could see the solicitation on videotape, it would bolster the credibility of Porras and Martinez at trial. However, the court found the exculpatory value of the tape in this regard was not reasonably apparent before trial. The court also determined there was no bad faith in the prosecution's handling of the videotapes. Because the prosecution preserved all the videotapes of the actual fighting that occurred at the bar, which the court described as "the most relevant evidence in the case," the court found no due process violation in the state's failure to preserve other footage of the bar that night.

We have no occasion to disturb this ruling. "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality [citation], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by

other reasonably available means." (*California v. Trombetta* (1984) 467 U.S. 479, 488-489, fn. omitted.)

Here, the record is clear that Porras and Martinez were not material witnesses to the actual fighting that took place at the Juke Joint on the night in question. As to whether Proios solicited them as "backup" before the fighting began, the fact is, they both testified that this occurred. So, the absence of any videotape of the solicitation did not deprive Cramer of this evidence. While the videotape evidence may have corroborated their testimony, that exculpatory use was not so apparent as to necessitate its preservation by the prosecution. (See *United States v. Marashi* (9th Cir. 1990) 913 F.2d 724, 732 [prosecution was not required to disclose evidence pertaining to a witness's credibility because such evidence was merely cumulative of other evidence that was presented at trial].)

Indeed, it was not apparent at all when the copies were made. The corroboration theory did not surface until the time of trial. We cannot fault the prosecution for failing to anticipate it, and instead focusing on the actual events which formed the basis for the charges against defendants. Because there is no evidence the prosecution acted in bad faith in failing to preserve the videotape of the pool table area, we find no due process violation. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [absent a showing of bad faith, the "failure to preserve potentially useful evidence does not constitute a denial of due process of law"].) Accordingly, the trial court did not err in refusing to suppress the videotape of the actual fighting that occurred at the bar. This was, as the trial court observed, highly relevant footage, and there was no basis for keeping it from the jury.

III

Next, Cramer contends the court erred in allowing the prosecution to admit evidence regarding a prior incident involving Fernandez and him. We find the evidence was properly admitted at trial.

Bartender Hill was the source of the evidence. He testified that about a month before the subject incident with Proios, there was a "problem" reported outside the Juke Joint late one evening. When he went outside to investigate, he saw a man on the ground who was either black or Puerto Rican. The man was disoriented and bleeding around the mouth. When Hill asked him what happened, he pointed to Cramer, who was standing nearby with Fernandez, and said Cramer had hit him. Cramer didn't deny it. Instead, he walked up to Hill and asked him what he was doing letting a "fucking nigger" in the area. At the time, Cramer was holding the same knife he used to stab Proios.

"As defendant correctly notes, character evidence is generally inadmissible to prove a person acted in conformity with it on a given occasion. (Evid. Code, § 1101, subd. (a).) Evidence Code section 1103 sets forth exceptions to this general rule. One exception allows a criminal defendant to offer evidence of the victim's character to show the victim acted in conformity with it. (Evid. Code, § 1103, subd. (a)(1).) If the defendant offers evidence showing the victim has a violent character, then the prosecution may offer evidence of the *defendant's* violent character to show the defendant acted in conformity with it. (Evid. Code, § 1103, subd. (b).)" (*People v. Myers* (2007) 148 Cal.App.4th 546, 552.)

Cramer claims he never opened the door in this regard, but we disagree. In cross-examining Proios, defense counsel spent a considerable amount of time questioning him about pictures that appeared on his MySpace website. Some of the pictures showed Proios posing with firearms in front of hotrods, and others showed him sparring with his fists. Although Proios claimed the firearms were just replicas, and that the only "gang" he belonged to was a car club, the defense suggested he was a "bad ass" gang member who liked to fight and cause trouble. The introduction of such evidence clearly opened the door for evidence pertaining to Cramer's propensity for violence.

Still, Cramer insists the prosecution went too far in this regard, by introducing evidence that was unduly prejudicial and violated his right to due process. While evidence of uncharged misconduct may be excluded if its probative value is substantially outweighed by its prejudicial effect (Evid. Code, § 352), the trial court has considerable discretion in making this determination. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404-405.) We will not disturb a court's decision in this regard unless it is arbitrary, capricious or patently absurd. (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438.)

Here, the evidence of Cramer's prior misconduct was relevant not only to show his propensity for violence, but also his animosity towards minorities. And since he used the same knife in both attacks, and they occurred at the same location, there was also an obvious factual connection between them. Moreover, the prior attack was not remote in terms of time, nor was it any more prejudicial than the facts underlying the charged offenses. Therefore, we cannot say the trial court's decision to admit evidence of the prior attack constituted an abuse of discretion or resulted in a violation of due process. (See *People v. Cabrera* (2007) 152 Cal.App.4th 695, 703-704 [character evidence to show a defendant's propensity for criminal conduct does not violate due process if the evidence passes scrutiny under Evidence Code section 352].)

IV

Lastly, Cramer maintains the court erred in denying his motion for a mistrial. Again, we disagree.

The motion came on the heels of testimony from knife fighting experts Marc MacYoung and Terry Hart. Before trial, the court ruled MacYoung and Hart could testify about the videotape of the stabbing, what an experienced knife fighter would do if he intended to kill someone, and whether Cramer's actions were consistent with such intent. However, the court ruled they could not give their

opinions as to whether Cramer actually possessed the intent to kill when he stabbed Proios. Unfortunately, neither expert complied with this ruling.

During direct examination by defense counsel, MacYoung opined that Cramer did not intend to kill because he did not target any of Proios' vital areas. He also said that rather than try to kill Proios, it appeared that Cramer was just hitting him out of rage, and that the knife strikes were merely incidental. In this regard, he described Cramer's' stabbing actions as more like "drunk[en]" or "pissed off" punches, as opposed to blows designed to end Proios' life.

On rebuttal, Hart testified for the prosecution that Cramer's actions were consistent with the intent to kill. He also said "what I've seen on the video is the intent for Cramer was to kill this person, not to strike him one time and to disengage. He kept engaging." The court overruled defense counsel's objection to this testimony, but later on, when Hart opined that Cramer's intent was to kill Proios, the court interjected on its own behalf and struck that opinion. Thereupon, the court told the jury, "that's not what this witness is here to testify about. He's here to testify about the videotape."

Outside the presence of the jury, the defense argued Hart's testimony warranted a mistrial, but the court disagreed. Noting both experts had offered their opinion on Cramer's intent, the court decided that rather than declaring a mistrial, it would suffice to admonish the jurors that it was "up to [them] to decide whether Mr. Cramer had the intent to kill," and that they were to "disregard anything the expert said about whether Mr. Cramer acted with intent to kill."

Notwithstanding this direct admonition, Cramer claims he was entitled to a mistrial because he was "irreparably harmed" by Hart's opinion that he intended to kill Proios. In reviewing this claim, we must keep in mind that it is only in the exceptional case that """the improper subject matter [of a witness's testimony] is of such a character that its effect . . . cannot be removed by the court's admonitions."

[Citation.]'" (*People v. Olivencia* (1988) 204 Cal.App.3d 1391, 1404.) Whether the statement rises to this level is "'a speculative matter, and the trial court is vested with considerable discretion'" in ruling on the issue. (*People v. Williams* (1997) 16 Cal.4th 153, 211, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 854.)

As set forth above, Hart was not the only expert testimony to testify about Cramer's state of mind. In fact, before Hart even took the stand, defense expert MacYoung testified that Cramer *lacked* the intent to kill in attacking Proios. So, while some of Hart's statements may have been improper, they were not unchallenged or unrebutted by the defense. Instead, they merely served to "even the score" on the issue of intent. Under these circumstances, we see nothing to indicate the court's very specific admonishment to the jury to disregard *both* experts' opinions about intent was ineffective. It is therefore our conclusion the trial court did not err in failing to declare a mistrial. No abuse of discretion has been shown.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

IKOLA, J.